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Historical perspectives on the Remedies¹

Introduction

[111] In the past 35 years, the European Community legislature has made consumer protection part of its lawmaking activities.² Not too long ago, the European Commission (EC) decided to incorporate consumer rights on unfair terms, distance contracts and consumer sales and guarantees, which were previously provided for in various directives, into a single consumer rights directive. The proposed Directive ("the Proposal") aims to harmonise completely the Member States' laws on consumer protection which until now were fragmented because the existing directives' lay down only minimum standards.³

The subject matter that the Proposal is designed to regulate includes the remedies available to consumers who have purchased defective goods. The standard used in the Proposal to determine the question whether there is then a breach of contract is based on the concept of conformity with the contract. In short, goods have to be sound and should correspond with the idea the consumer has formed of them by description or by sample. The specific criteria which are laid down in the Proposal to determine whether goods are in conformity with the contract, however, pose something of a problem. In order to explain and resolve this problem, the criteria's origins which lie in ancient Roman and [112] English common law need to be discussed. For clarity's sake, the point of discussion raised by the provisions in the Proposal will be described first.

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² The Council first adopted a resolution urging the EC to take steps to realise a consumer protection and information policy in 1975, OJ C 92, 25 April 1975; Straetmans 2009: 3.

³ COM 2008 (614): Preamble 131; although part of the Proposal has since been adopted in Directive 2011/83/EU, this latter covers only a small part of the Proposal discussed in this paper. It does not, for example, contain the remedies available to buyers in case of lack of conformity. Discussing the contents of the Proposal may nevertheless still prove worthwhile as its predecessor (Directive 1999/44/EC) which against all odds remains in force, presents the notion of lack of conformity in exactly the same wording as the Proposal. Moreover, although it is still unclear as to what will happen with the Proposal, the fact that its provisions result from an attempt to harmonise European consumer contract law fully, still counts for something. The provisions can illustrate the difficulties concomitant with harmonising the divergent European legal traditions. This does not hold in the case of the 1999 Directive since that Directive lays down only minimum standards and leaves the Member States ample scope to deviate from the rules formulated in the Directive. Consequently, the references to the Proposal's provisions are left unaltered and not replaced by the corresponding provisions in Directive 1999/44/EC.

Conformity with contract in the Proposal

Under the Proposal, a trader selling wares to a consumer is obliged to '*deliver the goods in conformity with the sales contract*'. As to what conformity entails, article 24(2) of the Proposal states that:

'Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:

- (a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;
- (b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;
- (c) they are fit for the purposes for which goods of the same type are normally used or
- (d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.'

Although these provisions may seem to belong to the more straightforward part of the directive, closer scrutiny shows them to be more obscure. A first question springing to mind is in section (c), where the word "or" suggests that for goods to be in conformity with the contract it is sufficient for them to be fit for their normal purpose. But if that were true, a trader would be able to contend that claims, other than that the goods are not fit for their normal purpose, will always fail once the goods' fitness for normal use has been proven. Some scholars therefore condemn the word "or" as a "rogue", or "typing failure", as it implies that, contrary to what they believe, the criteria are not required to be fulfilled cumulatively, but instead represent alternative standards of conformity.⁴

In this paper it will be demonstrated that, from a historical perspective, there is not necessarily anything wrong with interpreting the criteria as alternatives for determining goods' conformity. Indeed, requiring simultaneous compliance with all the criteria may even complicate things for consumers as goods may be suitable for a particular purpose, while at the same time not being fit for their normal purpose. Imagine a car devotee who buys a fancy vintage car that does not move faster than 20 miles per hour. The car is unfit for highway travelling and the buyer could consequently argue that the car is not fit for doing what a car should be able to do:

⁴ Twigg-Flesner 2009: 156; Loos 2010: 26.

transporting passengers over the country's highway network. Nevertheless, a court judge would be very unlikely to accept a breach of contract on the grounds that the car is not fit for normal use. It is after all fit for the particular use the buyer had in mind: conspicuous driving on a relaxed Sunday morning.

[113] We may ask ourselves what purpose the criteria then serve if they are not meant to corroborate each other? To answer that question, the criteria's origins need to be looked at. These are found in the doctrine of implied warranties, which was developed in the 19th century common law of England. To come to grips with these implied warranties' meaning and significance we have to examine their historical roots. The first section of this paper will therefore focus on ancient Roman law, because the foundations of a seller's liability based on goods' lack of quality in the good can be seen to be evolving in this period. In the second section, the way in which the various criteria for determining lack of conformity in English common law came into being is discussed, since the European legislature seems highly indebted to that system of law. In the final section, the provisions in the Proposal with reference to the findings of the preceding sections are discussed.

Before moving on to the main topic, some general remarks about early English and ancient Roman sales law need to be made in order to justify the decision to compare these two law systems. In English common law until the 19th century, the seller's liability for defects was often wholly excluded. The general maxim was *caveat emptor*, in English, "let the buyer beware".⁵ From the 19th century onwards however, courts increasingly sought to circumvent this maxim's rigor. The doctrine of implied warranties – which, as discussed above, eventually found its way into the Proposal's provisions – provided ample opportunities in that respect. However, before something could be acknowledged as warranted, it first had to be established what was actually implied in a sale. Did the goods have to be saleable? Was the particular purpose the buyer had in mind for the goods a relevant factor? Did it matter whether the goods were fit for what the man in the street thought they were meant for? English law already had a forerunner in this respect, as the English common law seems to have been inspired by concepts going back to the days when goods were bought and sold on the banks of the Tiber in ancient Rome. In order to get a clearer picture of the origins of the relevant sales law, Roman law of sales will be described briefly, focusing on its more particular regulations pertaining to latent defects, as these clearly relate to the issues of conformity, *caveat emptor* and implied warranties.

⁵ Benjamin 1868: 479; Broom 1852: 354.

1. Liability for defective goods in Roman law

Origins of lack of quality

In Roman law, as we know it from Byzantine sources⁶, a sale was a consensual contract that imposed certain duties on both the buyer and the seller. The former had to pay an agreed sum, while the latter had to deliver the purchase and ensure the buyer's quiet possession of it without the risk of eviction.

[114] It is worth noting that, in ancient Roman sales law⁷, the sales contract itself entailed only a duty to deliver the purchase and not to deliver it *free from defects*.⁸ In order to ensure the goods were free from defects the buyer himself had to take precautions. The first thing a buyer was obviously recommended to do was to keep a close eyes on matters while concluding a sale. After all, there was no warranty of quality implied. As a consequence, if goods turned out to be defective, all the costs were for the buyer. Only fraudulent behaviour by the seller gave rise to an action based on fraud.⁹ Fraud, however, was difficult to prove, and so it was certainly a wise thing to keep a close eye on matters. A second method available to the buyer to ensure the quality of the goods was to stipulate expressly that there would be no defects or qualities lacking. Such a stipulation gave ground for an action in case the good did not possess the stipulated qualities or suffered from defects that had been promised to be absent.¹⁰

The idea that one of the contracting parties merited additional protection was essentially inconceivable in ancient Roman society, in which honour, good faith and tradition occupied a central position in dealings with others and provided the framework within which trade took place. Ancient Mediterranean societies saw morality, rather than law, as the mechanism most suited to remedy cases in which something had gone amiss.¹¹

Like all societies, however, Roman society, too, was subject to change. By the third century B.C., the city of Rome had become an overcrowded metropolis into which all conceivable virtues and vices had found their way. This was having an effect on business transactions, especially on the slave and cattle market alongside the river Tiber. There, "wares" were sold and resold in large quantities by sellers who no longer had any personal attachment to

⁶ Our main source is the 6th century *Corpus iuris civilis*, which contained 12 books of imperial constitutions, 50 books of Roman jurisprudence, 4 books of elementary rules of law to be used for legal education and finally a book containing more than 150 constitutions (the *novellae*) promulgated after the whole *Corpus iuris* became law.

⁷ 'Ancient Roman sales law' means the civil law that applied to sales before being modified by statutes issued by Roman magistrates from the 3rd century B.C. onwards.

⁸ Kaser 1971: I:551.

⁹ The *actio doli*; Kaser 1971: I:557–558; van Oven 1948: 268; Feenstra 1984: 206.

¹⁰ The wording in Varro's *Country life* was as follows: 'Do you promise that those young bulls are fit and of a healthy constitution and that you will compensate if they happen to cause damages? (illosce iuvenços sanos recte deque pectore sano esse noxisque praestari spondesne)', Monier 1930: 10ff.

¹¹ Morley 2007: 85–89 and 58–59: 'The development of any form of exchange beyond the small-scale, highly personalised exchanges between members of the same community depended on establishing a workable alternative to trust as a basis for proceeding.'

them and frequently saw them no more than once: only on the day they were sold. This impersonalised trade induced fraudulent behaviour and with that, the need for additional protection for the parties most vulnerable to incurring losses as a result of swindling.¹²

[115] In this climate, the Roman magistrates who were assigned to supervise the slave and cattle market, the *curulian aediles*¹³, obliged traders of slaves and cattle to indicate beforehand whether their wares were suffering from the defects that the aediles had listed on their edictal blackboard '*because that kind of people is easily inclined to making profits in a most shameful manner*', as the jurist Paul tells us.¹⁴ If the seller ignored this obligation and a defect came to light, the buyer could bring an action for returning the goods or an action for reducing the price.¹⁵ But which conditions had to be fulfilled for either of these actions to be brought?

First of all, the edict excluded action by someone who had knowingly bought defective goods. '*If defects are understood to be present in the merchandise, (...) we can state that the edict ceases to be applicable, since it was only designed to prevent the buyer from being deceived*'.¹⁶ In other words, the defect had to be latent at the moment the sale was agreed on.

Secondly, the good's lack of quality had to be proven. For that, we are told to remember that '*Sabinus defines a defect in a slave as follows: his condition is contrary to nature, in that it deteriorates his body for the use, because of which nature has given us our body's fitness*'.¹⁷ To quote an example of what a body's natural use might entail: '*A eunuch, in truth, does not seem to me to be unsound. No, I think he is healthy, just as someone who has only one testicle, but who is still able to procreate*'.¹⁸ In another text, we find '*that if a seller warranted something about the*

¹² Cf. Strabo's remarks on the slave market at Delos for an impression of a slave market at the time of the Roman Republic: '*The exportation of slaves induced them most of all to engage in their evil business, since it proved most profitable; for not only were they easily captured, but the market, which was large and rich in property, was not extremely far away, I mean Delos, which could both admit and send away ten thousand slaves on the same day; whence arose the proverb, "Merchant, sail in, unload your ship, everything has been sold."* The cause of this was the fact that the Romans, having become rich after the destruction of Carthage and Corinth, used many slaves; and the pirates, seeing the easy profit therein, bloomed forth in great numbers, themselves not only going in quest of booty but also trafficking in slaves', cited in Meijer and Van Nijf 1992: 121; cf. Morley 2007: 58–59: '*The development of any form of exchange beyond the small-scale, highly personalised exchanges between members of the same community depended on establishing a workable alternative to trust as a basis for proceeding.*'

¹³ For an informative account of the aediles' tasks and how did or did not carry them out, see: Jakab 1997: 110ff.

¹⁴ D.21.1.44.1: '*nam nam id genus hominum ad lucrum potius vel turpiter faciendum pronius est.*'; for the stipulation the seller had to make, see D.21.1.28.

¹⁵ The *actio redhibitoria* and *actio quanti minoris* respectively.

¹⁶ D.21.1.1.6: '*Si intellegatur vitium morbusve Mancipii (...), potest dici edictum cessare: hoc enim tantum intuentum est ne emptor decipiatur.*'

¹⁷ D.21.1.1.7: '*Sed sciendum est morbum apud Sabinum sic definitum esse habitum cuiusque corporis contra naturam, qui usum eius ad id facit deteriore, cuius causa natura nobis eius corporis sanitatem dedit.*'

¹⁸ D.21.1.6.2: '*Spadonem morbosum non esse neque vitiosum verius mihi videtur, sed sanum esse, sicuti illum, qui unum testiculum habet, qui etiam generare potest.*'

*slave and if after that the buyer complains that this is not the case, he can start proceedings for returning the slave or reducing the price [...].*¹⁹

Thus, it appears that the Romans used both an objective and a subjective standard to judge whether goods had to be considered so unsound that the buyer had an action.²⁰ The departure point for the first standard is the goods' normal use. Sabinus' definition was used as a measure to determine what qualities could be expected. The second standard meanwhile was applicable if a warranty of the goods' quality had been given. The seller's assertions, not the goods' fitness for their natural use, determined the quality with which the goods had to comply. A slave said to be a great cook, but who, once set to work, appears not even to be able to tell a spoon from a fork does not answer to the seller's promise. However, this does not necessarily imply that he is also unfit for its natural use too, if we keep Sabinus' definition in mind. From the example, it is clear what an express warranty entailed and how the buyer could prove a breach of such warranties. But in [116] what way did a breach of fitness for the goods' natural use according to the standard laid down by Sabinus establish itself?

Let it first be clear that a Roman purchaser was expected to know that the seller's praise of his wares should not too readily be believed.²¹ Just as today's businesses portray their goods in a positive light in their TV commercials, so, did the slave sellers of old do their best to present their wares as favourably as possible. Florentinus consequently warns the buyer that:

'The things which are said in sales' advertising do not oblige the seller if they appear to be said about what is plain to see, for instance, when he says that a slave is handsome or a house properly built. If, however, he says that a man is literate or an artisan, he has to account for it, for because of that he sells for more'.²²

Thus, mere advertising alone did not impose any obligation on the seller.²³

It should also be noted that Florentinus treats recommendations about visible qualities of the good differently from praise of qualities which could not be seen from the outside. It made a difference whether the buyer could check the acclaimed qualities himself or had to rely on the seller's proclamations. In the first case, the seller was excluded from liability for warranties given, whereas in the latter case the seller had to live up to his promises.

Florentinus also seems to attach significance to whether an asserted quality entailed something more than what might generally be expected of the goods in question and for which a

¹⁹ D.21.1.18pr.: '*pr. Si quid venditor de mancipio adfirmaverit idque non ita esse emptor queratur, aut redhibitorio aut aestimatorio (id est quanti minoris) iudicio agere potest: (...)*'.

²⁰ A designation I borrowed from German law doctrine. For a clear exposition, see Canaris 2002: 811.

²¹ Jakab 1997: 133.

²² D. 18.1.43pr.: '*Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditiorem non obligant, velut si dicat servum speciosum, domum bene aedificatam: at si dixerit hominem litteratum vel artificem, praestare debet; nam hoc ipso pluris vendit*'.

²³ Jakab 1997: 134.

higher purchase price was justified. From the quoted example it appears that it was not self-evident that a slave could read or write Latin. Accordingly, being able to do so merited the slave's higher value.²⁴ The other side of the coin was that a seller who warranted that the slave was literate had to account for this special quality. If the slave turned out to be a mere scribbler, the seller was held liable and the buyer could recover at least part of the purchase price. Another jurist, Ulpian, held that a warranty could be given either by means of a formal stipulation or simply by an informal promise. Florentinus' text possibly offers an example of the latter.²⁵

In the following text another clue about what the goods' natural use may have meant is given. The jurist Gaius admonishes the buyer not to exaggerate the seller's claims for his own benefit. He only had an action,

'for example, if the seller has assured a slave's being trustworthy or much enduring or fast or needing little rest or being eager to earn himself some pocket-money, but the slave turned out to be of the opposite: unreliable, impudent, lazy, sluggish, unwilling, stupid, a gourmand. All this seems to mean that the buyer should not demand in a strict sense what the seller affirms, [117] but that he should do so in a moderate manner. For example, when a seller affirms the slave to be trustworthy, the buyer should not desire the graveness and firmness of character of a stoic philosopher and if the seller has affirmed the slave's endurance and little need of rest, the buyer should not demand continuous labour of him 24-hours a day. He should desire these things in accordance with justice and equity in a moderate way. Let it be clear that the same goes for all other things the seller promises'.²⁶

To sum things up: we have seen that the attitude towards sales in early Roman law was relatively severe vis-à-vis the buyer in that only fraudulent behaviour or acting against a promise triggered a seller's liability. The Roman *aediles* formulated exceptions to these rules to cope with problems arising in a changing society. Even so, these new rules required criteria to determine their scope. As a result, the Roman jurists excluded the seller from liability for visible defects and for qualities promised merely in advertising.

In the course of this process, the Roman jurists arrived at a distinction between a subjective and objective approach for measuring goods' quality. Sabinus formulated a definition of goods' natural use as a standard for determining a lack of quality and whether a seller had fulfilled his duties under the contract. It was also possible, however, for a seller to ascribe certain qualities to the goods or to warrant the absence of defects. In that case, liability was found to exist if the goods did not correspond with the seller's assertions. A lot of ink was consequently

²⁴ Jakab 1997: 133-134.

²⁵ Jakab 1997: 134-135.

²⁶ D.21.1.18pr: *'verbi gratia si constantem aut laboriosum aut curracem vigilacem esse, aut ex frugalitate sua peculium adquirentem adfirmaverit, et is ex diverso levis protervus desidiosus somniculosus piger tardus comesor inveniatur. Haec omnia videntur eo pertinere, ne id quod adfirmaverit venditor amare ab eo exigatur, sed cum quodam temperamento, ut si forte constantem esse adfirmaverit, non exacta gravitas et constantia quasi a philosopho desideretur, et si laboriosum et vigilacem adfirmaverit esse, non continuus labor per dies noctesque ab eo exigatur, sed haec omnia ex bono et aequo modice desiderentur. Idem et in ceteris quae venditor adfirmaverit intellegemus.'*

spilt over the question as to what constituted a given warranty. Ulpian seems to have considered an informal promise about goods' quality to be sufficient to establish an express warranty of quality. In his view, the formal requirements were less important than the communication of a message on which the buyer was likely to rely.

Sabinus' definition comes very close to the one adopted in the Proposal for a Directive on Consumer Rights, where goods have to be 'fit for the purposes for which goods of the same type are normally used',²⁷ which wording in their turn is reminiscent of the common law doctrine of implied warranties. As the common law definitions of conformity with contract have heavily influenced international sales law and through that the European Directives on consumer sales, I will now turn to the development that took place in England. There, too, a rather harsh liability regime, principally governed by the *caveat emptor* maxim, gradually made way for a system based on a broader liability of the seller.

²⁷ art. 24 (2) (c) Proposal.

[118] 2. Common Law

As discussed above, ancient Roman sales law did not require the seller to deliver goods free from defects. As a result, losses resulting from any such defects were entirely for the buyer's account. This equivalent of a 'fairly harsh idea of *caveat emptor*'²⁸ may be traced back to the face-to-face character of sales transactions in the distant past.²⁹ In ancient Rome, Aulus and Gellius were both present at the spot where the bargain was agreed and Aulus could judge with his own eyes the quality of the goods offered by Gellius.³⁰ If he did not use his eyes properly, he only had himself to blame if the purchase turned out to be defective.

Almost two thousand years later, on an island formerly seen as a provincial backwater of the Roman Empire, but by now ruling its own thriving imperium, we can see that the new rulers were still inspired by the Roman attitude. Consequently, a seller's liability for defects in 17th-century common law was also accepted only in the event of fraud or breach of an express warranty.

This is illustrated in a 1603 case, reported by Sir George Croke. A goldsmith named Lopus sold a stone to Chandelor, claiming it to be a bezar.³¹ However, after scrutiny by the purchaser, the stone turned out to be anything but a bezar. Accordingly, Chandelor sued Lopus. The verdict, however, was for Lopus since 'the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material'.³² Unless the seller had expressly warranted a particular quality, he could not be sued for breach of contract if goods appeared to be defective. Apparently, a 'bare affirmation' did not amount to a warranty. Lopus had therefore duly performed his contractual obligation.

Not much seemed to have changed at the end of the eighteenth century. In 1778 Lord Mansfield said that '*a warranty extends to all faults known and unknown to the seller. Selling for a sound price without warranty may be a ground for an assumpsit, but, in such a case, it ought to be laid that the defendant knew of the unsoundness.*'³³ In other words, Lord Mansfield almost literally voices the ancient Roman rule that a seller was only liable for defects if he had behaved fraudulently or had made an express warranty about the goods' condition.³⁴

In 1802, however, the first signs of a changing attitude began to be seen in *Parkinson v*

²⁸ Zimmermann 1996: 306. Although the author uses the maxim *caveat emptor* in a Roman law context, I have not been able to locate the adage used in the exact same manner in the Roman law corpus. However, the ancient Romans' severe attitude towards buyers who suffering loss because of a bad bargain largely corresponds with early-modern common law practice, as will be shown in this section.

²⁹ Buckland and McNair 1952: 282.

³⁰ Or the purchaser made use of the eyes of his representative, a son or slave.

³¹ Stevenson 2011: 'A small stony concretion which may form in the stomachs of certain animals, especially ruminants, and which was once used as an antidote for various ailments'.

³² *Chandelor v Lopus*, Cro. Jac. 4, 79 E. R. 3 (ex. 1603).

³³ *Stuart v Wilkins*, 99 E.R. 20 (ass. 1778).

³⁴ See p. 4.

Lee.³⁵ Parkinson had bought hops from Lee and, judging by some samples, expected [119] the hops to be of good quality. However, the hops deteriorated in the meantime and, on delivery, turned out to be '*bad, damaged and unsaleable hops*'.³⁶

The main issue at stake was whether a seller could be held accountable for the goods' unsoundness on grounds other than fraud or an express warranty given. After all, does not a fair price paid for the hops boil down to the same as a warranty of merchantability? And should the seller not be held accountable if the hops appeared to be of no such quality, even if he had no knowledge of the defects at the time the sale was agreed on? Despite the eloquence with which these arguments were put forward, the court found this not to be so. Admittedly, the hops were not of merchantable quality, but there had been nothing wrong with the samples on the basis of which Parkinson had agreed to buy. As the only warranty given by Lee was that the bulk of the hops was of the same quality as the samples, which at the time of the agreement happened to be the case, Lee had done nothing wrong. As to the question of whether '*it being the understanding of both parties to such a contract, though not expressed in the special warranty, that the one was to sell and the other to purchase a merchantable commodity*', Grose J. proclaimed that:

'If there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. It is the fault of the buyer that he did not insist on a warranty'.³⁷

Accordingly, the seller should not bear the loss resulting from the goods' being of another quality than that promised by the sample. It was the buyer's own fault not to have demanded a warranty against latent defects. Lawrence J., consequently added that '*knowing, as he must have known, as a dealer in the commodity, that it was subject to the latent defect which afterwards appeared, he bought it at his own risk*'.³⁸ *Caveat emptor* was thus still the general rule between equal parties.

Things definitely began to change, however, when ongoing industrialisation and mass production contributed to a shifting of the cards between the buyer and seller. The buyer was increasingly seen as the weaker party in need of protection.³⁹ Did it still then make sense to apply standards stemming from a society in which the equality of the parties was assumed to a society in which parties' equality was continually subject to change? The characteristics of sale were also changing in that the object of sale was often no longer a unique piece of craftsmanship, but instead a replaceable commodity, produced in large numbers. Should we not take into account then that it was becoming increasingly difficult to inspect such goods? These and other questions

³⁵ *Parkinson v Lee*, 2 East, 314 (1802).

³⁶ *Parkinson v Lee*, 2 East, 314 (1802).

³⁷ *Parkinson v Lee*, 2 East, 321 (1802).

³⁸ *Parkinson v Lee*, 2 East, 322 (1802).

³⁹ Sedgwick, Conley, and Sleigh 1964: 141.

might have gone through Lord Ellenborough's mind when he made the following remarks in a case of a sale of 'waste silk', in which the buyer could not inspect the goods before delivery:

'I am of the opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular [120] warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He [the buyer, NdB] cannot without a warranty insist that it [the good, NdB] shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill'.⁴⁰

The main point in this case is that circumstances may result in the principle of *caveat emptor* being set aside. According to Lord Ellenborough, this was justified by the fact that the buyer had not had an opportunity to inspect the goods.

And if one sheep leaps over the ditch, the rest will follow. Soon other situations were also found to entail an implied warranty. In *Brown v Edgington*, Brown ordered a rope from Edgington for the purpose of raising pipes of wine from his cellar and also communicated this purpose to Edgington. Unfortunately, '*the said last-mentioned rope, by reason of its being so bad, unfit, and improper for that purpose as aforesaid, [...] gave way and broke, and thereby the said pipe of wine fell to the ground, and the said pipe was broken, shattered, staved in, and spoilt, and the wine in the said pipe was spilt, scattered, spoiled, and poured out upon the ground, and thereby became and was wholly lost to the plaintiff*'.⁴¹ On the question of whether Edgington was liable because he had undertaken to supply Brown with the requested rope, Tindal C. J. states that:

'It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed.'⁴²

Here, *caveat emptor* is set aside, and an implied warranty for the buyer's particular purpose is found if a buyer relied on the seller's judgment that the goods he was about to purchase were fit for what the buyer had in mind.⁴³

⁴⁰ *Gardiner v Gray*, 171 E. R. 146 (1815); See also *Laing v Fidgeon*, 71 E.R. 55, (1815).

⁴¹ *Brown v Edgington*, 133 E.R. 753 (C.P. 1841).

⁴² *Brown v Edgington*, 133 E.R. 756 (C.P. 1841); the fact that Edgington himself was not the manufacturer was held to be immaterial; informing and relying on the seller's skill and judgment suffice to find an implied warranty of fitness for a particular purpose.

⁴³ For an earlier, but less unequivocal case see: *Jones v Bright*, 5. Bing. 531 (1829).

The whole state of affairs pertaining to the sale of goods and the giving of warranties was summed up in the 1868 landmark judgment *Jones v Just*:

‘If, therefore, it must be taken as established that, [...], on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use, or shall be merchantable, as the case may be, it is difficult to understand why a similar term is not to be implied on a sale by a merchant to a merchant or dealer who has had no opportunity of inspection’.⁴⁴

[121] An example of a case in which the seller did not have the opportunity to inspect the goods was encountered in the above ‘waste silk’ case, in which Lord Ellenborough was prompted to accept an implied warranty of merchantability.⁴⁵ In *Jones v Just* this rule was extended over cases in which a buyer relied on the seller’s judgment to supply him with goods fit for a particular purpose. Depending on the circumstances of the case, such reliance could lead to an implied warranty that the goods were suitable for the particular purpose intended by the buyer. According to Mellor J., what matters is whether the buyer could exercise judgment of his own:

‘And this appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference, whether the sale is of goods specifically appropriated to a particular contract, or to goods purchased as answering to a particular description’.⁴⁶

Indeed, indicating a particular purpose was not enough to invoke an implied warranty. Mellor J. refers to several cases in which an implied warranty for fitness for a particular purpose was not accepted. In *Chanter v Hopkins* the buyer’s written order (‘*Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace*’) did not impose an implied warranty on the seller that the smoke-consuming furnace was suited for a brewery.⁴⁷ In *Ollivant v Bayley*, which concerned the sale of a two-colour printing machine, it was established that ‘*if the machine described was a known, ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not*’.⁴⁸ If the buyer had had the chance to form a judgment of his own, there was no question of the seller’s liability for fitness for a particular purpose; the buyer should have assured himself that goods were suited to the use to which he intended to put them.

We may conclude that, at the end of the 19th century, *caveat emptor* still applied if the goods could and should be inspected by the buyer. If the buyer mistrusted his own judgment about the goods’ quality, he had to insist on a warranty. If he did not, but nevertheless agreed on the sale, any resulting losses were for his own account. An implied warranty of the goods’

⁴⁴ *Jones v Just*, L.R. 3, 203 (Q.B. 1868).

⁴⁵ See p. 11

⁴⁶ *Jones v Just*, L.R. 3, 207 (Q.B. 1868).

⁴⁷ *Chanter v Hopkins*, 150 E.R. 1484 (Q.B. 1838).

⁴⁸ *Ollivant v Bayley*, 114 E.R. 1258 (Q.B. 1843).

merchantability was not to be accepted in such cases, according to the rule laid down in *Parkinson v Lee*. On the other hand, there were situations which the buyer did not have the opportunity to inspect the merchandise or in which he justifiably relied on the seller's skill and judgment to determine the goods' fitness for their intended use. In the first case, common law accepted a warranty of the goods' merchantability or reasonable fitness for use. In the second case, the court found an implied warranty of fitness for a particular purpose to exist, as in the case of *Jones v Just*. It is here that common law comes close to the notion of conformity with contract appropriated by the drafters of current European contract law. Now, therefore, it is time to bring the two together and to draw some conclusions from the comparison.

[122] **3. Comparison and conclusions**

Roman Law

Under ancient Roman law, a seller did not have to deliver goods free from defects. This, together with the ancient Romans' strict attitude to liability, similar to the common law maxim *caveat emptor*, resulted, by our standards, in relatively little protection of the buyer's interests. If goods proved to be defective, the ancient Roman buyer had to bear all resultant losses, unless the defects derived from fraudulent behaviour by the seller or from the seller's acting against an express warranty. The system's stringency was mitigated by the fact that sale transactions in ancient Rome concerned specific goods, which were bought with both parties and the merchandise present on the spot. The buyer could therefore avoid a bad outcome by using the opportunity to inspect the wares.

Was this rule, however, still equitable in the event of defects the buyer could not have detected even on close inspection? If goods turned out to contain a latent defect, a buyer nevertheless had to bear the losses. Losses that were not the result of the buyer's lack of diligence, but instead of mere bad luck. Should the seller, too, not bear part of the costs in such cases? It was not until the 3rd century B.C. that the Roman magistrates saw reasons to formulate exceptions to their rather rigorous viewpoint. It was in this period that the *curulian aediles* started imposing a greater liability on sellers of slaves or beasts of burden. From then on, such sellers were obliged to warrant expressly the absence of certain defects, and more importantly for the topic under discussion, were liable for latent defects.

The new rules resulted in a need to define when goods were defective. One way to achieve this was simply to look at the contents of the contract. If the seller had asserted something as a reason for raising the selling price, he was liable if the assertion proved to be untrue. Other important factors in assessing the seller's liability were whether the buyer had good reason to trust the seller's judgment, and whether the seller's statements were more than mere puffery. Alongside this subjective approach, a more objective standard was applied by means of Sabinus' definition of the natural use of goods.

Common Law

The developments seen in English common law of the 17th to 19th centuries had much in common with the abovementioned developments in ancient Rome. In the 17th century it was possible to get away with selling a simple stone as a bezar on the grounds of not having promised the fact in an express warranty, but by bare affirmation only.⁴⁹ In order to have an action, the buyer had to have demanded an express warranty, if he had not, that was tough luck for him. In other words: *caveat emptor*. As in ancient Roman law, liability was accepted only in the event of fraud or breach of an express warranty. This viewpoint continued to hold for another one

⁴⁹ See p. 9.

hundred years.

[123] At the beginning of the 19th century, however, things changed. Common law courts began to distinguish between different types of sales, each of which merited a different approach. In 1815 Lord Ellenborough set aside the maxim of *caveat emptor* for an implied warranty of saleability in the event of a sale by description. A key factor prompting the learned judge to grant the buyer an action was that the buyer had not been able to inspect the goods before delivery.

This reminds us of Florentinus' distinction between the inward and outward qualities of the wares.⁵⁰ To the Roman jurist it mattered whether the defects could be detected on the spot. If this was not so, the seller was answerable for his assertions. The same held in 19th century common law; a seller who described his wares, but could not show them, had to account for the goods being in conformity with the description.

With the acceptance of facts implying a warranty of quality, English common law too required a definition of what was actually implied. Again, the answers resemble the conclusions reached following Roman contemplations on the matter. There, it was Sabinus' definition of the deteriorated natural use of the goods, whereas in common law it was the goods' fitness for their normal use, as formulated in *Jones v Just* that triggered the seller's liability for lack of quality.

Beyond goods' fitness for their normal use, an implied warranty for fitness for a particular purpose was found to exist in certain limited cases. Before, however, such a warranty could be accepted, it had to be established first that the buyer had made his intentions known to the seller and secondly that he had relied on the seller's skill and judgment to supply him with the appropriate goods. These requirements can still be found today in the legal offspring of 19th - century common law; the UK Sale of Goods Act ("SGA") and the US Uniform Commercial Code ("UCC").⁵¹

Thus, the requirements first formulated in *Brown v Edgington* continue to hold in common law. In English law, someone who buys an item because of its brand (a Senseo coffee machine, for example), cannot be justified in relying on the seller if the seller says that the machine is also suitable for Nespresso pads. The buyer can inform the seller of how he intends to

⁵⁰ See pp. 6-7; Johnston 1999: 81.

⁵¹ Section 14 (3) SGA 1979: '*Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known— (a) to the seller, or (b) (...), any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker* [emphasis added]'; §2-315 UCC: '*Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose*' [emphasis added]; Cf. Article 35(2)(b) UN Convention on Contracts for the International Sale of Goods ("CISG"): '*[the goods, NdB] are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement* [emphasis added].'

use the product, but this will be of no help if the Senseo machine subsequently breaks down because of an incorrect brand of coffee pad being used.⁵² Hence, it cannot be said the requirement has lost its practical footing; a seller may [124] correctly claim that the buyer was foolish to assume something that nobody else would dare to imagine and therefore does not have a case.

The corresponding provision in the Proposal, however, does not mention the second requirement that the buyer should rely on the seller's judgment. Article 24(2)(b) states only that the goods '*are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted*'.⁵³ This omission raises some questions. First, it could imply that the buyer of a Senseo machine will have a case, if the seller is not allowed the defense that the buyer could not reasonably have relied on the former's skill and judgment. Secondly, it would have been easy to avoid this kind of misunderstanding by replicating the wordings used in the SGA, UCC or CISG, where circumstances can show that reliance on the seller's skill and judgment was unreasonable.⁵⁴ One may feel inclined to ask why this was not done so in the Proposal.⁵⁵

Furthermore, the provision seems to stand on an equal footing with the other criteria laid down in Article 24(2) of the Proposal. A possible consequence of taking the criteria as cumulative is that a sale by sample implies that the goods correspond with the sample, are fit for normal use and for the particular purpose intended by the buyer. As we saw at common law, this does not necessarily have to be so. Indeed, in *Parkinson v Lee* the bulk of the goods had to correspond with the sample, but nothing more than that. If, for example, the samples were less than fit for normal use, but the buyer should have discovered that on inspection, the seller could not be held liable if the bulk also turned out to be unfit for normal use. This rule still holds in the prevailing Sale of Goods Act.⁵⁶

The indiscriminate accumulation of criteria in the Proposal has lured drafters and scholars into a discussion of whether the criteria should be interpreted as cumulative or alternative. It is more likely, however, that the criteria are neither one nor the other since they have evolved and have been cultivated over the course of history as criteria for specific types of sales contracts.

⁵² Cf. *Chanter v Hopkins*, 150 E.R. 1484 (1838), cited on p. 12; Sedgwick, Conley, and Sleight 1964: 146.

⁵³ Article 24 (2) (b) Proposal.

⁵⁴ Cited on the previous page.

⁵⁵ I have not been able to trace the EP's arguments for deleting the requirement in their amendments to the EC's proposal COM (1995) 0520 final. Neither do the EC's comments on the amended proposal give a clue; see COM (1998) 217 final, p. 3. COM (1999) 16 final, said to contain the Commission's opinion about the EP's amendments to the Proposal, cannot be retrieved digitally due to dead links.

⁵⁶ Section 15 (2) SGA 1979: '*In the case of a contract for sale by sample there is an implied term— (a) that the bulk will correspond with the sample in quality; (...); (c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample*'. For a case in which the marking-off of the different criteria and their relationship with distinct types of sale clearly comes to the fore see *Godly v Perry*, 1 W.L.R. 9 (Q.B. 1960).

Seen in this light, it is not at all strange that fitness for a particular purpose has found a separate place in the statutory provisions on warranties in both the US and UK. To put an end to this confusion and to resolve the problem of rogue "ors", rephrasing of the pertinent provisions in the Proposal, analogous to what has been done in common law countries, may be a suggestion worth considering.

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